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7 DER Touristik Deutschland GmbH

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9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 FOURTH DIMENSION SOFTWARE, a  
California corporation,

CASE NO. 3:19-cv-05561-CRB

12 Plaintiff,  
13 v.  
14 **DEFENDANT DER TOURISTIK  
DEUTSCHLAND GMBH'S ANSWER TO  
PLAINTIFF'S FIRST AMENDED  
COMPLAINT**

15 DER TOURISTIK DEUTSCHLAND  
GMBH, a German corporation,

16 Defendant.

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1           Defendant Der Touristik GmbH Deutschland, a German corporation (“DTDE”), through  
 2 its undersigned counsel, hereby answers and asserts affirmative defenses to the First Amended  
 3 Complaint of Plaintiff Fourth Dimension Software (“FDS”), dated October 20, 2020 (“FAC”).  
 4 DTDE’s answers and affirmative defenses are based on information and knowledge thus far  
 5 secured by DTDE, and DTDE reserves the right to amend or supplement its answers and  
 6 affirmative defenses based on facts later discovered, pleaded, or offered. To the extent that any  
 7 express or implied allegations in the Complaint are not specifically admitted herein, Defendant  
 8 hereby denies such allegations.

9           **I. INTRODUCTION**

10           1.       DTDE lacks sufficient knowledge or information to form a belief as to the  
 11 allegations set forth in Paragraph 1 of the FAC, and therefore denies those allegations.

12           2.       DTDE lacks sufficient knowledge or information to form a belief as to the  
 13 allegations set forth in Paragraph 2 of the FAC, and therefore denies those allegations.

14           3.       Admitted.

15           4.       DTDE admits that “The decades-long business relationship between FDS and  
 16 DER had been built around a series of contracts in which FDS agreed to license to DER certain  
 17 software products....” DTDE denies that “FDS had developed [certain software products] from its  
 18 proprietary technology and trade secrets.” DTDE admits the remainder of the allegations of  
 19 Paragraph 4 of the FAC.

20           5.       Denied.

21           6.       Denied.

22           7.       DTDE lacks sufficient knowledge or information to form a belief as to the  
 23 allegations set forth in Paragraph 7 of the FAC, and therefore denies those allegations.

24           8.       Admitted.

25           **II. JURISDICTION AND VENUE**

26           9.       Admitted.

27           10.      DTDE lacks sufficient knowledge or information to form a belief as to the  
 28 allegations that “Section 17 of the licensing agreements at issue specifically state that the venue

1 and jurisdiction for any disputes arising from the contracts are to rest in the courts of San Mateo,  
 2 California under the laws of the State of California” because DTDE has been unable to locate  
 3 executed copies of the licensing agreements between itself and FDS, and therefore denies those  
 4 allegations. DTDE denies the remainder of the allegations of Paragraph 10 of the FAC.

5 **III. SUBSTANTIVE ALLEGATIONS**

6       11. DTDE admits the allegations “FDS and DTDE’s predecessor, DER, entered into  
  7 . . . separate written license agreements . . . (collectively referred to herein as the ‘License  
  8 Agreements’) whereby DTDE licensed several related software products from FDS. Under the  
  9 . . . License Agreements, DTDE licensed three of FDS’s products: SafePath, Easy Path, and  
 10 EasyClient (collectively, the ‘Tools’).” DTDE denies the allegations that there were “three”  
 11 licensing agreements between itself and FDS to the extent this allegation is intended to mean  
 12 “only three” such agreements. DTDE lacks sufficient knowledge or information to form a belief  
 13 as to the remainder of the allegations of Paragraph 11 of the FAC because DTDE has been unable  
 14 to locate executed copies of the licensing agreements between itself and FDS, and therefore  
 15 denies those allegations.

16       12. Admitted.

17       13. DTDE admits that “EasyPath is a computer application for the Tandem application  
  18 development platform. EasyPath automates computer program creation through macros and other  
  19 features. . . .” DTDE denies the remainder of the allegations of Paragraph 13 of the FAC.

20       14. Admitted.

21       15. DTDE lacks sufficient knowledge or information to form a belief as to the  
  22 allegations set forth in Paragraph 15 of the FAC, and therefore denies those allegations.

23       16. DTDE admits that “Phoenix is a tour operator automation system. . . . As the  
  24 License Agreements were being finalized, FDS and DTDE’s predecessor were negotiating a  
  25 software development agreement, pursuant to which FDS would develop the Phoenix travel  
  26 reservation system for DTDE. That agreement was concluded in October 1994.” DTDE lacks  
  27 sufficient knowledge or information to form a belief as to the remainder of the allegations set  
  28 forth in Paragraph 16 of the FAC, and therefore denies those allegations.

1           17. DTDE lacks sufficient knowledge or information to form a belief as to the  
 2 allegation “Like other FDS clients. . . .” and therefore denies that allegation. DTDE admits the  
 3 remainder of the allegations of Paragraph 17 of the FAC.

4           18. Denied.

5           19. DTDE lacks sufficient knowledge or information to form a belief as to the  
 6 allegations set forth in Paragraph 19 of the FAC because DTDE has been unable to locate  
 7 executed copies of the licensing agreements between itself and FDS, and therefore denies those  
 8 allegations.

9           20. DTDE lacks sufficient knowledge or information to form a belief as to the  
 10 allegations set forth in Paragraph 19 of the FAC because DTDE has been unable to locate  
 11 executed copies of the licensing agreements between itself and FDS, and therefore denies those  
 12 allegations.

13          21. DTDE lacks sufficient knowledge or information to form a belief as to the  
 14 allegations set forth in Paragraph 19 of the FAC because DTDE has been unable to locate  
 15 executed copies of the licensing agreements between itself and FDS, and therefore denies those  
 16 allegations.

17          22. DTDE lacks sufficient knowledge or information to form a belief as to the  
 18 allegations set forth in Paragraph 22 of the FAC because DTDE has been unable to locate  
 19 executed copies of the licensing agreements between itself and FDS, and therefore denies those  
 20 allegations.

21          23. DTDE lacks sufficient knowledge or information to form a belief as to the  
 22 allegations of Paragraph 23 of the FAC because DTDE has been unable to locate executed copies  
 23 of the licensing agreements between itself and FDS, and therefore denies those allegations.

24          24. DTDE admits that the Supplementary Agreement speaks for itself. Except as  
 25 otherwise admitted, denied.

26          25. DTDE lacks sufficient knowledge or information to form a belief as to the  
 27 allegation “the License Agreements” as that term is defined in the FAC because DTDE has been  
 28 unable to locate executed copies of the licensing agreements between itself and FDS, and

1 therefore denies that allegation. DTDE admits the remainder of the allegations of Paragraph 25 of  
 2 the FAC.

3       26. DTDE admits that “DER, and/or subsequently DTDE, hired a number of former  
 4 FDS employees. . . . These former FDS employees included . . . FDS’s Chief Technology  
 5 Officer.” DTDE lacks sufficient knowledge or information to form a belief as to the remainder of  
 6 the allegations of Paragraph 26 of the FAC and therefore denies those allegations.

7       27. DTDE lacks sufficient knowledge or information to form a belief as to the  
 8 allegations set forth in Paragraph 27 of the FAC because DTDE has been unable to locate  
 9 executed copies of the licensing agreements between itself and FDS, and therefore denies those  
 10 allegations.

11       28. Denied.

12       29. Denied.

13       30. Denied.

14       31. Denied.

15       32. Paragraph 32 consists of FDS’s demands and legal conclusions to which no  
 16 response by DTDE is required. To the extent a response is required, DTDE admits that FDS  
 17 demands payment and asserts a claim for breach of contract, but denies that the allegations have  
 18 any merit.

#### 19       **IV. CAUSES OF ACTION**

##### 20                   **FIRST CAUSE OF ACTION – BREACH OF CONTRACT**

21       33. DTDE incorporates by references its responses to Paragraphs 1 through 32 of the  
 22 FAC as if set forth fully here.

23       34. DTDE lacks sufficient knowledge or information to form a belief as to the  
 24 allegation “the License Agreements” as that term is defined and further elaborated in the FAC  
 25 because DTDE has been unable to locate executed copies of the licensing agreements between  
 26 itself and FDS, and therefore denies that allegation. DTDE admits the remainder of the  
 27 allegations of Paragraph 34 of the FAC.

28       35. DTDE lacks sufficient knowledge or information to form a belief as to the

1 allegations set forth in Paragraph 35 of the FAC because DTDE has been unable to locate  
 2 executed copies of the licensing agreements between itself and FDS, and therefore denies those  
 3 allegations.

4       36. DTDE lacks sufficient knowledge or information to form a belief as to the  
 5 allegations set forth in Paragraph 36 of the FAC because DTDE has been unable to locate  
 6 executed copies of the licensing agreements between itself and FDS, and therefore denies those  
 7 allegations.

8       37. Denied.

9       38. Denied.

10      39. Denied.

11 **V. PRAYER FOR RELIEF**

12       DTDE denies that FDS is entitled to any recovery or relief in connection with the  
 13 allegations set forth in the FAC, including, but not limited to, the allegations set forth in the  
 14 Prayer for Relief.

15                   **AFFIRMATIVE DEFENSES**

16       As affirmative, separate, and other defenses to the FAC asserted against DTDE, DTDE  
 17 states as follows, without assuming the burden of proof on matters where it has no such burden.  
 18 In doing so, DTDE specifically reserves the right to restate, re-evaluate, or recall any defenses  
 19 and to assert additional defenses based on information learned or obtained during discovery.

20                   **FIRST AFFIRMATIVE DEFENSE – FAILURE TO STATE A CLAIM**

21       The FAC fails to state a claim upon which relief may be granted.

22                   **SECOND AFFIRMATIVE DEFENSE – LACK OF PERSONAL JURISDICTION**

23       This Court lacks personal jurisdiction over DTDE.

24                   **THIRD AFFIRMATIVE DEFENSE – STATUTE OF LIMITATIONS**

25       FDS's claims are barred, in part or in whole, because it filed this action after the statute of  
 26 limitations had expired under California Code of Civil Procedure § 337(a).

27                   **FOURTH AFFIRMATIVE DEFENSE – LACHES**

28       FDS's claims are barred, in part or in whole, by the doctrine of laches, in that FDS has

1 unreasonably delayed efforts to enforce its rights, if any, despite full awareness of DTDE's  
 2 actions.

3 **FIFTH AFFIRMATIVE DEFENSE – ACQUIESCENCE**

4 FDS's claims are barred, in part or in whole, by the doctrine of acquiescence, in that  
 5 FDS's affirmative conduct regarding its rights, if any, and its unreasonable delay in seeking to  
 6 enforce such rights have unduly prejudiced DTDE.

7 **SIXTH AFFIRMATIVE DEFENSE – WAIVER**

8 FDS waived its rights under the contracts at issue in that it knew of DTDE's conduct with  
 9 respect to obligations FDS alleges as the basis for its claims, but freely and knowingly gave up its  
 10 right to have DTDE perform those obligations in the manner FDS alleges DTDE was required to  
 11 do under the contracts at issue.

12 **SEVENTH AFFIRMATIVE DEFENSE – UNCLEAN HANDS**

13 Some or all of the relief sought by FDS is barred under the doctrine of unclean hands in  
 14 that FDS has engaged in inequitable behavior, including bad faith, related to the subject matter of  
 15 its claims.

16 **EIGHTH AFFIRMATIVE DEFENSE – IMPLIED LICENSE**

17 FDS's claims are barred, in part or in whole, because its affirmative conduct created an  
 18 implied license with respect to DTDE's conduct that FDS alleges as the basis of its claims.

19 **NINTH AFFIRMATIVE DEFENSE – NO DAMAGE**

20 Some or all of the relief sought by FDS is barred because, even if FDS's allegations were  
 21 true, FDS suffered no damage.

22 **TENTH AFFIRMATIVE DEFENSE – FAILURE TO MITIGATE**

23 Some or all of the relief sought by FDS is barred because FDS failed to undertake  
 24 reasonable efforts or expenditures to mitigate its damages, if any.

25 **ADDITIONAL DEFENSES**

26 DTDE reserves the right to assert additional defenses based on information learned or  
 27 obtained during discovery.

1 Dated: December 22, 2020

DLA PIPER LLP (US)

2 By */s/ Jesse Medlong*

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4 JESSE C. MEDLONG  
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Attorneys for Defendant  
DER Touristik Deutschland GmbH

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